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Supreme Court, U.S.
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In The

Supreme Court of the United States

RUSSELL SMITH,

Petitioner,

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court's holding in *Sims v. Apfel*, 120 S.Ct. 2080 (2000), that a Social Security claimant is not required to exhaust issues in a request for review in order to preserve judicial review of those issues, should also apply to the Court of Appeals for Veterans Claims.

Whether the jurisdiction of the Court of Appeals for the Federal Circuit pursuant to 38 U.S.C. § 7292 is limited to consideration of issues of statutory and regulatory interpretation which were previously presented to the Court of Appeals for Veterans Claims.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 214 F.2d 1331 (Fed. Cir. 1999), and reprinted in the Appendix ("App.") at App. 1. The opinion of the Court of Veterans Appeals in *Smith v. West* is published as 12 Vet.App. 312 (1999) and reprinted at App. 2.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on June 13, 2000 and Rehearing En Banc was declined on August 16, 2000.

PROVISIONS INVOLVED

38 U.S.C. § 7292

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other

than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to the United States courts of appeals from United States district courts.

(b)(1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.

(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Appeals for Veterans Claims.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be –

(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.

(2) Rules of review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28.

STATEMENT OF THE CASE

Mr. Smith served on active duty in the U.S. Marine Corps from August 1946 to October 1946. Mr. Smith was discharged for honorable conditions due to enuresis. Mr. Smith then served in the U.S. Army from September 1950 to December 1951. Mr. Smith was again discharged under honorable conditions from the Army due to enuresis and related behavioral and psychiatric problems.

Mr. Smith applied to the Department of Veterans Affairs (the "agency") for service-connected psychiatric disabilities. Mr. Smith's claim was denied because the Agency determined that Mr. Smith's disabilities pre-existed service and were not aggravated by service. After another denial in 1993, Mr. Smith submitted additional

evidence in support of his claim. The Agency refused to reopen Mr. Smith's claim because it determined that he had failed to present new and material evidence to reopen the claim.

Mr. Smith appealed the Agency's determination to the Court of Appeals for Veteran Claims ("CAVC"), arguing that pursuant to 38 U.S.C. § 5108, the BVA failed to properly determine whether new and material evidence had been presented. In its April 7, 1999 opinion, the CAVC affirmed the BVA's April 1995 decision. The CAVC held that Mr. Smith had not submitted new evidence and therefore did not fulfill the requirement for new and material evidence necessary to reopen his claim for service connection for a psychiatric disorder.

Mr. Smith then appealed to the Federal Circuit arguing that the Agency failed to inform him what type of evidence constituted "new and material" evidence as provided in 38 U.S.C. § 5108. Mr. Smith argued that pursuant to 38 U.S.C. § 5103(a), the Agency was under a duty to inform a veteran prior to the denial of reopening a claim, of what evidence the Agency required in order to reopen the claim. Mr. Smith further argued that the Agency therefore deprived him of a property right to reopen a claim with new and material evidence without giving accord to the procedural due process afforded to such a right.

The Federal Circuit dismissed the appeal, holding that Mr. Smith had not raised the issue before the CAVC. The Federal Circuit reasoned that pursuant to 38 U.S.C. § 7292(a), it could only review issues relating to statutory interpretation that were relied upon by the CAVC in its

decision below. Thus, if an issue of interpretation is first raised before the Federal Circuit, it could not have been relied upon below. The Federal Circuit further held that it would not address a challenge to the constitutionality of a statute's interpretation unless it was raised below.

REASONS FOR GRANTING THE WRIT

In light of the Court's recent holding in *Sims v. Apfel*, 120 S.Ct. 2080 (2000), this case provides the Court with an opportunity to resolve a conflict of law currently existing in the Federal Circuit regarding their jurisdiction to decide issues that were not explicitly raised before the CAVC below. In *Sims v. Apfel, supra*, this Court recognized the greater latitude accorded claimants in informal and nonadversarial proceedings. Specifically, the Court held that the judicially imposed requirement of issue exhaustion is inappropriate in the social security context because the parties have a nonadversarial relationship. "It is true that we have imposed an issue-exhaustion requirement even in the absence of a statute or regulation. But the reasons we have done so does not apply here. The basis for a judicially imposed issue exhaustion requirement is an analogy to the rule that appellate courts will not consider arguments raised before trial courts." *Sims v. Apfel*, 120 S.Ct. at 2084.

The Court thus reasoned that in a non-adversarial system, the issue-exhaustion requirement was not necessary. "More generally, we have observed that it is well settled that there are wide differences between administrative agencies and courts, and we have thus warned

against reflexively assimilating the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts." *Id.* at 2085.

Indeed, the import of this Court's holding and its application to the veterans adjudication system was recognized by the Federal Circuit in *Forshey v. Gober*, 2000 WL 1363714 (Fed. Cir.), *slip op.* at p. 3, wherein the court noted:

> [t]he Supreme Court's Sims rationale and articulation apply with equal, if not greater, force in this arena. The system for awarding veterans benefits is 'imbued with special beneficence' from a sovereign grateful to a 'special class of citizens, those who risked harm to serve and defend their country.' It is intended to be a 'nonadversarial, ex parte, paternalistic system,' that is 'uniquely pro-claimant.' It is, in short, or at least it ought to be, the antithesis of an adversarial formalistic dispute resolving apparatus. (Citations omitted).

Indeed, the Federal Circuit Panel in *Forshey* opined that while *Sims* involved court review of agency decisions and the Federal Circuit reviews Veterans Courts decisions, the distinction was of no consequence since the Veterans Court is not a fact finding body like a district court and "the administrative decision of the board, to the extent we are concerned passes through the Veterans Court as a matter of law." *Forshey, slip op.* at p. 7. Consequently, the *Forshey* court held that it did have jurisdiction to review an issue that was not raised below.

Thus, in light of *Smith v. West*, 214 F.3d 1331 (Fed. Cir. 2000), and *Forshey*, it is apparent that there is currently a

significant difference of opinion in the Federal Circuit as to its jurisdiction to review issues that were not raised below. Therefore, the Petitioner requests that the Supreme Court resolve this issue in the veterans' favor by determining that the same reasoning followed by the Court in *Sims v. Apfel* applies equally, if not more so, to the review of statutes and regulations veterans' benefits decisions by the Court of Appeals for the Federal Circuit.

The historical lack of judicial review of the veterans' benefits adjudications system and the uniqueness of the system are illustrative of why the doctrine of issue exhaustion should play no part in this special system. Until 1988, when Congress enacted the Veteran's Judicial Review Act, the Veteran Administration stood in "splendid isolation as the single federal administrative agency whose major functions were explicitly isolated from judicial review." H.R. Rep. No. 100-963, 100th Cong., 2d Sess. 10, *reprinted in*, 1988 U.S.C.C.A.N. 5782, 5791. When the 1988 Act was finally passed, the final legislation contained five crucial components: previous preclusion of judicial review of veteran benefit entitlements was repealed; the United States Court of Veterans Appeals (now called the Court of Appeals for Veteran Claims or "CAVC") was created; the Board of Veterans' Appeals (BVA) was retained as the final administrative decisional body with the Department of Veteran Affairs; a $10 attorney's fee cap was abolished; and most importantly for the issues discussed in this writ, an additional level of judicial review was created by allowing review of CAVC decisions by the Federal Circuit on certain narrow issues of law. *See*, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

The Federal Circuit has a vital role in judicial review of veteran claims. However, as a statistical matter, substantial appellate review for most cases ends at the CAVC. Since 1990, the CVA has disposed of over 10,000 cases. *See*, Prof. William A. Fox, *An Analysis of Jurisprudence, Organization, and Operation of the Newest Article One Court*, 2d ed. 182 (1998). In comparison, the Federal Circuit has issued full opinions on only a small number of its appeals on the merits. *Id.* One reason for the relatively small number of cases decided by the Federal Circuit on the merits is due to the Federal Circuit's limited jurisdiction. CAVC factual determinations are insulated from Federal Circuit review unless the facts implicate constitutional questions. *See*, 38 U.S.C. § 7292(d)(2).

Beyond Federal Circuit review, dissatisfied parties may petition the Supreme Court for writ of certiorari. However, in the ten years that the CAVC has been in existence, the Supreme Court has granted only one certiorari petition, *Brown v. Gardner*, 513 U.S. 115 (1994), a case involving large implications for the CAVC and Federal Circuit regarding the proper canons of construction for statutory and regulatory review. Thus, in all practicality to date, a veteran's last opportunity for judicial review of veteran benefits issues has been in the Federal Circuit. Such a practicality makes it quite clear that the Federal Circuit's role is essential to ensure the veteran's statutory right to judicial review of the statutes and regulations of the Department of Veterans Affairs.

From its creation, the Veterans Administration's statutes and regulations had not been subjected to consistent judicial scrutiny. In essence, the VA was successful in

avoiding consistent judicial review of the Agency's interpretations of their statutes and regulations and instead were able to rely upon their own interpretations. In 1988, Congress determined that the VA would no longer be insulated from judicial review and Congress expressly assigned the Court of Appeals for the Federal Circuit the responsibility for the interpretation of VA statutes and regulations, as well as constitutional claims. The Petitioner asserts that the doctrine of issue exhaustion is inappropriate in this non-adversarial arena. The Federal Circuit's jurisdiction should be interpreted to allow consideration of questions of law involving constitutional questions and issues of statutory and regulatory interpretation without those issues having necessarily been presented to the CAVC.

As such, when presented with any relevant issue of statutory interpretation, the Federal Circuit's jurisdiction should be implicated as contemplated by Congress. Declining judicial review of statutory interpretations based on an issue-exhaustion requirement does not serve this non-adversarial system, but instead serves to create an adversarial system that deprives a veteran of the judicial review provided for by Congress, because he failed to present the issue to the CAVC.

The sheer number of pro se claimants in the CAVC demonstrates why the doctrine of issue exhaustion is fundamentally inequitable. In 1999, 78% of the claimants appealing to the CAVC were pro se. (Fifth Judicial Conference, 12 Vet.App. XXVII, 1999). Thus, the majority of appellants before the CAVC are non-attorney litigants who are completely unaware of the issue exhaustion doctrine. Combined with the statutory limitation upon the

Federal Circuit's jurisdiction by Congress to issues of statutory and regulatory interpretations or a constitutional issue, a pro se appellant is effectively denied judicial review of a statutory or regulatory interpretation by the holding in *Smith* and *Belcher v. West,* 214 F.3d 1335 (Fed. Cir. 2000). There is no statutory requirement for the presentation of issues of statutory and regulatory interpretation to the CAVC as a predicate to trigger the Federal Circuit's jurisdiction. This is a "judicially created" doctrine which should not be applied in veterans' law or used to limit even further the jurisdiction of the Federal Circuit. Issues of statutory and regulatory interpretations or constitutional issues will not be raised before the CAVC by pro se appellants. As a consequence of the *Smith* and *Belcher* decisions, judicial review will not be afforded pro se appellants.

Lastly, the doctrine of issue exhaustion is also inherently unfair in the veteran's benefits adjudication system due to the developing state of law. Because judicial review has only been in existence since 1988, following the Agency's extended period of "splendid isolation" the case law has been constantly changing due to the Federal Circuit's interpretations of the Agency's statutes and regulations. This year alone, the Federal Circuit in precedential opinions has reversed and remanded ten cases, thereby creating new interpretations of statutes and regulations which had been relied upon for decades by the Agency to wrongfully deny veterans' claims. Such activity at the Federal Circuit indicates that the Agency's statutes are often misinterpreted. To deny a pro se veteran judicial review by the Federal Circuit because he failed to raise an interpretation of a statute or regulation

before the CAVC is inherently and fundamentally unfair. The doctrine of issue exhaustion may make sense in the "normal" civil adjudication process wherein the state of law has been well settled for many years and skilled advocates in "adversarial proceedings" know to "raise" issues to "preserve" such questions for appellate review. The role of the Federal Circuit as contemplated by Congress was to provide for a limited, but precise grant of jurisdiction to decide questions of law interpreting the Agency's statutes and regulations. It is antithetical to "limit" further the Federal Circuit's jurisdiction by the judicially created doctrine of "issue exhaustion." But such a doctrine is nonsensical in a legal arena where the state of law is still being created and subject to change.

Finally, this Court's holding in *Sims* is consistent with 38 U.S.C. § 7292 – the Federal Circuit's jurisdictional statute.

38 U.S.C. § 7292 provides, in relevant part:

> (a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

> (c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide **any challenge** to the validity of any statute or regulation **or any interpretation thereof brought under this section,** and to interpret constitutional and statutory provisions, **to the extent presented and necessary to a decision.** The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.
>
> (d) The Court of Appeals for the Federal Circuit **shall decide all relevant questions of law,** including interpreting constitutional **and statutory provisions.**

(*Emphasis added*). In determining that it could not exercise jurisdiction over an issue of statutory interpretation not explicitly raised before and relied upon by the CAVC, the Federal Circuit in *Smith,* focused **only** on 38 U.S.C. § 7292(a) which provides that a party may obtain review of the decision with respect to a statutory interpretation relied upon by the CAVC. However, the Panel failed to acknowledge the other relevant provisions of 38 U.S.C. § 7292, and consequently misinterpreted its own jurisdiction.

The plain language of 38 U.S.C. § 7292(c) provides that the Federal Circuit **shall** have jurisdiction to decide **any** statutory interpretation to the extent presented and necessary to a decision. Further, 38 U.S.C. § 7292(d) provides that the Federal Circuit **shall** decide **all relevant questions of law.** Neither provision requires that the question of law or statutory provision was relied upon below by the CAVC.

The plain language of 38 U.S.C. § 7292 requires the Federal Circuit to exercise its jurisdiction over statutory interpretations even if such issues were not explicitly raised below to the CAVC. Even if there were some question as to whether one provision seems to allow for jurisdiction over statutory interpretations not relied upon by the CAVC below, and one provision disallowing jurisdiction over such issues, the statute must be interpreted in the veteran's favor for allowance of jurisdiction. Courts must "**ultimately**" read statutory provisions in a veteran's favor. *King v. St. Vincent's Hospital*, 502 U.S. 215, 220 – 221 (1991) (*emphasis added*). The canons of statutory construction of veteran benefits laws require that the provisions be construed in the beneficiaries' favor. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). *See, also, Brown v. Gardner*, 513 U.S. 115, 117-118 (1994).

Thus, if 38 U.S.C. § 7292 is construed in the veteran's favor, it must be interpreted to require Federal Circuit jurisdiction issues of statutory interpretation even if such issues were not raised below.

CONCLUSION

Because of the Federal Circuit's conflicting holdings in *Forshey* and *Smith, supra*, the question of law regarding the Federal Circuit's jurisdiction is clearly unsettled and a veteran has no way of knowing whether his appeal will be reviewed or dismissed. Thus, on the basis of this conflict of law, as well as the Court's recent holding in *Sims v. Apfel*, the Petitioner respectfully requests the

Court to instruct the Federal Circuit regarding its jurisdiction over issues of statutory interpretation that are not raised below. For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
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99-7133

RUSSELL E. SMITH

Claimant-Appellant,

v.

TOGO D. WEST, JR.,

Respondent-Appellee.

DECIDED: June 13, 2000

Before LOURIE, GAJARSA, and LINN, *Circuit Judges*.

PER CURIAM.

Russell E. Smith appeals from the decision of the Court of Appeals for Veterans Claims affirming the Board of Veterans' Appeals' denial of his request to reopen his claim for service-connected disability benefits. *See Smith v. West*, No. 95-638 (CAVC Apr. 7, 1999). Because Smith does not raise an issue with respect to the validity of any statute or regulation or any interpretation thereof that was relied on by the Court of Appeals for Veterans Claims, we dismiss for lack of jurisdiction.

BACKGROUND

Smith is a veteran of both the United States Marines and the United States Army, having served in the Marines for three months in 1946 and in the Army for fifteen months from 1950 to 1951. *See id.*, slip op. at 1-2. He was

honorably discharged from both the Marines and the Army due to unsuitability for service because of enuresis and related behavioral and psychiatric problems. *See id.* Smith has applied to the Department of Veterans Affairs ("the agency") for disability benefits several times. *See id.* at 2-3. Each of his applications was denied because the agency found that his psychiatric conditions pre-existed, and were not aggravated by, his service. *See id.* Following the denial of an application in 1993, Smith submitted more evidence in support of his disability claim. *See id.* at 3. The Board found it cumulative of record evidence it had previously considered, and thus not new and material evidence that his disabilities were incurred or aggravated during service. *See id.* Smith appealed this finding to the Court of Appeals for Veterans Claims, which affirmed, holding that the Board did not clearly err in finding the newly submitted evidence cumulative. *See id.* at 4-5. Smith timely appealed to this court in accordance with 38 U.S.C. § 7292 (1994).

DISCUSSION

Our jurisdiction to review a judgment of the Court of Appeals for Veterans Claims, set forth in 38 U.S.C. § 7292, is highly circumscribed. *See Helfer v. West*, 174 F.3d 1332, 1335 (Fed. Cir. 1999). "[A]ny party . . . may obtain a review of the decision with respect to the validity of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court [of Appeals for Veterans Claims] in making the decision." *See* 38 U.S.C. § 7292(a) (1994). We must decide "all relevant questions of law,

including interpreting constitutional and statutory provisions," and

> hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for the Veterans Claims that [we] find to be –
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> >
> > (B) contrary to constitutional right, power, privilege, or immunity;
> >
> > (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
> >
> > (D) without observance of procedure required by law.

Id. § 7292(d)(1). However, "[e]xcept to the extent that an appeal . . . presents a constitutional issue, [we] may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." *Id.* § 7292(d)(2).

The only issues raised on appeal are whether the agency misconstrued 38 U.S.C. § 5103(a) (1994), and whether it thereby violated Smith's right to due process, by failing to inform Smith as to what would constitute "new and material evidence" of service connection. Smith argues that "the Agency has a duty to inform the veteran, prior to the denial of the claim, of what evidence the Agency has been unable to collect or develop in order to

support an award of benefits." App. Br. at 9. Smith further argues that "the Agency deprived [him of] his property right to submit a claim for reopening with new and material evidence without giving accord to the procedural due process afforded to such a right." *Id.* at 16.

The agency responds that Smith is precluded from raising a challenge to the interpretation or application of section 5103(a) or a due process challenge because he did not raise those issues in any of the proceedings below. It further argues that, were we to reach the merits of Smith's statutory interpretation argument, under *McKnight v. Gober*, 131 F.3d 1483 (Fed. Cir. 1997), the agency "does not have an absolute duty pursuant to 38 U.S.C. § 5103(a) to inform claimants, whenever they submit a claim to reopen, as to what evidence constitutes new and material evidence sufficient to support a reopening of a claim." Resp. Br. at 17.

We agree with the agency that the statutory interpretation issue in this appeal is not properly before us. 38 U.S.C. § 7292(a) provides that "any party . . . may obtain a review of the decision with respect to the validity of any statute or regulation . . . or any interpretation thereof . . . *that was relied on by the Court* [of Appeals for Veterans Claims] in making its decision." (emphasis added). Compliance with the jurisdictional statute requires that the issue raised on appeal be one of validity or interpretation that the veterans court expressly decided or impliedly addressed. Thus, our jurisdiction of an appeal requires that the issue raised relate to the validity of a statute or regulation, or an interpretation thereof, *and* that it have been relied on by the veterans court in its decision. If an issue of interpretation is first

raised on appeal here, it cannot have been relied on below, unless the court itself raised it and relied on it *sua sponte*. The "relied on" language ordinarily means that the issue of validity or interpretation was a part of the court's decision as indicated by its written opinion. Of course, we have held that avoidance of an issue by the veterans court, when that issue was raised below, does not deprive an appellant of the right to raise that issue again here. *See Linville v. West*, 165 F.3d 1382, 1384 (Fed. Cir. 1999).

This holding is consistent with our earlier decision in *Boggs v. West*, 188 F.3d 1335, 1338 (Fed. Cir. 1999), where we stated that "[t]he Court of Appeals for Veterans Claims did not rely on the interpretation of law that is now raised on appeal. Thus Boggs has no statutory right of appeal on an issue that was not raised and relied on below." The rule we reaffirm here, in addition to being statutorily based, has the salutory effect of avoiding surprise. As we further stated in *Boggs*, "[t]his rule ensures that 'parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' " *Boggs*, 188 F.3d at 1338 (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). In addition, we benefit from the thinking of the Court of Appeals for Veterans Claims on issues with which it is thoroughly familiar. The time to set the parameters of a case is before it comes to this court. An appellant who has not settled on an appealable issue until he or she has arrived at this court has thus missed the train.

In this case, like *Boggs*, the only issue presented to the Court of Appeals for Veterans Claims was the factual issue concerning whether the veteran presented new and material evidence of service connection. *See id.* at 1337. Like the statutory interpretation issue presented in *Boggs*, the statutory interpretation issue presented in this case was never raised or addressed in the Court of Appeals for Veterans Claims and we therefore cannot address it here. *See id.* Having represented Mr. Boggs in that case, Smith's counsel is well aware of this rule. *Boggs* has been followed by other cases affirming its holding as the rule in this court. *See Bradley v. West*, No. 99-7200, 2000 WL 274285 (Fed. Cir. Mar. 13, 2000); *Wright v. DVA*, No. 98-3328, 1999 WL 1212017 (Fed. Cir. Dec. 15, 1999); *Siewart v. West*, No. 99-7053, 1999 WL 969891 (Fed. Cir. Dec. 8, 1999) (nonprecedential cases). The only distinction we would make over *Boggs* is the technical one of dismissing the appeal, rather than affirming, as we did in *Boggs*.

The constitutional argument that Smith raises here also was not raised below. In the absence of a timely challenge to the constitutionality of a statute or regulation, or its interpretation, we similarly have no jurisdiction. *Cf. In re Bailey*, 182 F.3d 860, 865 (Fed. Cir. 1999) (holding that we have jurisdiction to review a "free-standing" constitutional issue not involving a challenge to the interpretation or validity of a statute or regulation).

In addition to asking this court to adjudicate issues not raised below, Smith presents the same statutory interpretation arguments raised and rejected in *McKnight*. Even though *McKnight* is the leading case on this issue, it was not cited in Smith's opening brief or distinguished in

his reply brief. Arguing for the first time on appeal a position already decided by this court, without even citing that prior precedent, runs dangerously close to bringing a frivolous appeal.

Section 5103(a) states that "[i]f a claimant's application for benefits under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application." 38 U.S.C. § 5103 (1994). In *McKnight* we explicitly rejected the precise argument raised here, that section 5103(a) requires the agency to notify the veteran, in all circumstances, what he needs by way of further evidentiary support in order to reopen his claim. We held that section 5103 does *not* impose an absolute obligation on the agency to notify the veteran what evidence would be required to reopen a claim. *See McKnight*, 131 F.3d at 1485. Rather, we interpreted section 5103(a) as imposing an obligation to notify the veteran of factual evidence needed when the circumstances of the case "put [it] 'on notice that relevant evidence may have existed, or could have been obtained, that if true, would have made the claim "plausible" and that such evidence had not been submitted with the application.' " *Id.* at 1485 (quoting *Robinette v. Brown*, 8 Vet.App. 69, 80 (1995)). In other words, we held that the agency is required to notify the veteran "when the circumstances reasonably suggest that such additional relevant evidence may be found elsewhere." *Id.* "[N]othing in the statute suggest[s] that Congress intended the Department to notify veterans of the particular evidence needed to make their applications complete where the Department could not reasonably have had notice of the existence of such evidence." *Id.* It

therefore also follows that since there is no absolute duty to notify, there can be no *per se* violation of due process for failure to give such notice.

CONCLUSION

As in *Boggs*, Smith has raised issues not presented or addressed below and we therefore cannot address them. The appeal is therefore

DISMISSED.

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 95-638

RUSSELL E. SMITH, APPELLANT,

V.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the Board of Veterans' Appeals

(Decided Apr. 7, 1999)

Gary L. Beaver was on the pleadings for the appellant.

Robert E. Coy, Acting General Counsel; *Ron Garvin*, Assistant General Counsel; *Michael A. Leonard*, Deputy Assistant General Counsel; and *Michele Russell Katina* were on the pleadings for the appellee.

Before KRAMER, FARLEY, and IVERS, *Judges*.

IVERS, *Judge:* The veteran, Russell E. Smith, appeals an April 14, 1995, decision of the Board of Veterans' Appeals (BVA or Board) which determined that no new and material evidence had been submitted to reopen a claim for service connection for a psychiatric disorder. This appeal is timely and the Court has jurisdiction over the case pursuant to 38 U.S.C. § 7252(a). For the reasons set forth below, the Court will affirm the Board's April 1995 decision.

I. FACTS

The veteran served in the U.S. Marine Corps from August 1946 to October 1946. Record (R.) at 168. He was discharged under honorable conditions due to

unsuitability for service because of enuresis (bed wetting). R. at 60-61. The enuresis was noted as having preexisted service and having not been aggravated in service. *Id.* A 1948 rating decision denied service connection for enuresis. R. at 176.

The veteran then served in the U.S. Army from September 1950 to December 1951. R. at 167. His discharge from the Army was also due to unsuitability, and followed a recommendation of discharge by a medical officer who diagnosed enuresis and immaturity with symptomatic habit reaction. R. at 167, 123.

In the years following his separation from service, the veteran pursued claims for VA benefits that are unrelated to the claim that is the subject of this appeal. The first indication in the record of a claim for service connection for a psychiatric disability is in the transcript from a VA regional office hearing held in October 1986. At that hearing, the veteran testified that, in 1946, he had been discharged from service in the Marines for bed wetting and nervousness. R. at 283. His representative stated that the veteran contended that his nervous condition was aggravated by service. R. at 287. A December 1986 rating decision found that the veteran's claim for service connection for nervousness was not supported by the evidence. R. at 302.

In March 1988, a private psychiatrist referred the veteran to a psychologist for evaluation. R. at 328. The evaluation report noted that the veteran had stated that his discharge from the Army in 1951 was "for psychiatric reasons, including bed wetting," and that he repeatedly denied having had those problems. *Id.* The evaluation

concluded that the veteran currently had "significant psychopathology" but did not link it to his military service. R. at 331.

A May 1988 rating decision and a March 1990 hearing officer's decision determined that no new and material evidence had been submitted to reopen the veteran's claim for service connection for a psychiatric disability. R. at 337, 365-66. The veteran appealed the March 1990 decision, and the BVA remanded the case to the RO in June 1991 for "full[ ] develop[ment] [of] the veteran's claim for service connection for a psychiatric disorder." R. at 373, 387-88, 402-03.

The veteran had two separate VA psychiatric examinations in August 1991. R. at 412-18. One psychiatrist stated his impression of the veteran's condition as "dependent personality disorder with some elements of schizoid personality disorder," but added that the impression was not definite, and "recommend[ed] strongly" that the veteran be hospitalized for observation. R. at 415. The second psychiatrist diagnosed "[s]chizoid personality disorder." R. at 418. Upon receipt of this information, the BVA again remanded the case with instructions that the veteran be hospitalized for observation "to permit the psychiatric examiners who examined him in August 1991 to complete their reports and diagnosis(es)." R. at 442.

The psychiatrists again examined the veteran during a VA hospitalization in July 1992. R. at 465-70. One psychiatrist referred the veteran for a psychological evaluation which was completed that same month. R. at 471-76. The psychiatrists concurred in diagnoses of dependent

personality disorder with schizoid traits and post-traumatic stress disorder, with the stressor having occurred when the veteran was 12 years old. R. at 466, 470. The evaluating psychologist recommended reevaluation in one to three months "to determine the stability of [the veteran's] cognitive performance." R. at 476.

In a January 1993 decision, the BVA denied the veteran's claim for service connection for a psychiatric disorder. R. at 501-05, 507-09. The Board concluded that the veteran's diagnosed disorder "was not manifested during service, and the stressor causing [PTSD], diagnosed decades after service, occurred prior to service."

Following the January 1993 BVA decision, the veteran's representative submitted an October 1992 VA psychological evaluation report. R. at 512-18. The report contained a diagnosis of PTSD from childhood, noted dependent and schizoid personality traits, and indicated moderate stress. R. at 516. In the decision presently on appeal, the BVA found that the report was cumulative of information that was before the Board at the time of the January 1993 decision and thus, not new, and that it was not material because it was not probative of whether a psychiatric disorder was incurred in or aggravated during service. R. at 10. The Board concluded that "no new and material evidence ha[d] been presented to reopen a claim for service connection for a psychiatric disorder." R. at 8.

II. ANALYSIS

A claim that is disallowed by the Board may not be reopened and allowed, and a claim based on the same

factual basis may not be considered, unless new and material evidence with respect to the claim is presented or secured. 38 U.S.C. §§ 7104(b) and 5108; *see Barnett v. Brown*, 83 F.3d 1380 (Fed. Cir. 1996). In order for evidence to be sufficient to reopen a previously disallowed claim, it must be *both* new *and* material. If evidence is not new, the inquiry ends and the claim cannot be reopened.

By regulation, VA sets forth several criteria that must be met for evidence to be new and material. 38 C.F.R. § 3.156(a). Regarding newness, the regulation requires that the newly submitted evidence cannot have been previously submitted to agency decisionmakers and that it cannot be either cumulative or redundant. *Id.* Echoing these requirements, this Court has defined "new evidence" as evidence which (1) was not in the record at the time of the final disallowance of the claim, and (2) is not "merely cumulative" of other evidence in the record. *Evans v. Brown*, 9 Vet.App. 273, 283 (1996); *see also Elkins v. West*, ___ Vet.App. ___, ___, No. 97-1534, slip. op. at 10-11 (Feb. 17, 1999).

The Court generally reviews new-and-material-evidence determinations under the deferential "clearly erroneous" standard of review. *Elkins*, ___ *Vet.App.* at ___, slip op. at 13. Under the "clearly erroneous" standard, "if there is a 'plausible' basis in the record for the factual determinations of the BVA, even if this Court might not have reached the same factual determinations, [the Court] cannot overturn them." *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990). Evidence to be considered in a new and material evidence review includes all evidence submitted "since the time that the claim was finally disallowed on any basis, not only since the time that the claim

was last disallowed on the merits." *Evans*, 9 Vet.App. at 285.

In the present case, the last final disallowance of the veteran's claim for service connection for a psychiatric condition was a January 1993 BVA decision. The only evidence submitted after that disallowance was an October 1992 psychological evaluation report. The BVA found that the report was not new evidence because it was merely cumulative of evidence that was in the record at the time of the 1993 BVA decision. R. at 10.

Initially, the Court notes previous case law that established that non-record evidence that was not in the case file but was within the Secretary's control (such as VA records), and that predated a BVA decision and could reasonably have been expected to be part of the record, was therefore constructively " 'before the Secretary and the Board' when the BVA decision was made." *Bell v. Derwinski*, 2 Vet.App. 611, 613 (1992) (per curiam order) (citing 38 U.S.C. § 7252(b)). In *Bell*, unlike in the present case, the appellant had sought, on appeal to this Court, to include evidence in the record that had not been in the record before the Board. *Id.* at 612. The Court found that the appellant's evidence might have been factually determinative of the appellant's claim, that a remand was in order when such evidence was not in the record, and that it was necessary for items considered by the Board to be included in the record on appeal. *Id.* at 612-13.

Whether the evidence in question was constructively before the Board in January 1993 is not at issue because that is not the decision presently pending on appeal. Rather, the evidence in question *was* in the record before

the Board prior to its April 1995 decision, the decision now under scrutiny, and was, in fact, the express object of that decision.

Based on this distinction, the Court will assume that evidence constructively before the Board in 1993 could still be new evidence for purposes of its 1995 decision. Nevertheless, such is not the case here where there is a plausible basis in the record for the Board's finding that the veteran's newly submitted evidence was merely cumulative of other evidence that was previously in the record. *See Elkins* and *Gilbert*, both *supra*. The October 1992 report reaches the same diagnostic conclusion regarding PTSD that was reached in July 1992 psychiatric reports which were in the record prior to the January 1993 BVA decision. R. at 516, 466, 470. The report notes dependent and schizoid personality traits and moderate stress, conditions that were diagnosed in the July 1992 psychiatric and psychological evaluation reports. R. at 516, 466, 470, 475. The Board's factual determination that the October 1992 report was not new evidence was not clearly erroneous.

The essence of the Board's April 1995 decision that the evidence submitted since the last final disallowance of the veteran's claim was not new and material was that the evidence was not new because it was cumulative of evidence already of record. The reasons and bases given by the Board included a statement that the evidence was not material based on lack of probativeness, but this finding was not necessary to the determination that the evidence was not new. Once it was determined that the evidence was not new, no further analysis was required, for it could not be "new *and* material" if it was not "new."

The veteran has argued in this appeal that the Secretary never applied the presumption of aggravation in considering his claim regarding his diagnosed PTSD, and that the presumption is new and material evidence "in the context of Mr. Smith's attempt to have his claim for service connection reopened." Appellant's Brief at 29, 21-37. The United States Court of Appeals for the Federal Circuit, in affirming a decision of this Court, has held that the "failure to apply[ ] a statutory or regulatory burden-shifting presumption does not constitute 'new and material evidence' for the purpose of reopening a claim under 38 U.S.C. § 5108." *Routen v. West*, 142 F.3d 1434, 1440 (Fed. Cir. 1998), *cert. denied*, 67 USLW 3152 (U.S. Nov. 2, 1998) (No. 98-197). With respect to an argument in *Routen* that the presumption was never applied, the Federal Circuit stated, "[U]nless Mr. *Routen* is able to reopen his claim by showing clear and unmistakable error, or by presenting new and material evidence, the issue of whether or not the presumption of aggravation applies cannot be addressed." *Id.* at 1443. Pursuant to *Routen*, the veteran's argument that the presumption of aggravation is new and material evidence is without merit.

III. CONCLUSION

Upon consideration of the record and the pleadings, the Court holds that the veteran has not submitted new evidence and therefore has not fulfilled the requirement for new and material evidence to reopen his claim for service connection for a psychiatric disorder. The Court is satisfied that the BVA decision that is the subject of this appeal meets the "reasons or bases" requirements of 38

U.S.C. § 7104(d)(1). Accordingly, the April 14, 1995, decision of the BVA is AFFIRMED.

United States Court of Appeals
for the Federal Circuit

99-7133

RUSSELL E. SMITH,

Claimant-Appellant,

v.

HERSHEL W. GOBER, Acting Secretary of Veterans Affairs,

Respondent-Appellee.

ORDER

(Filed Aug. 16, 2000)

A combined petition for panel rehearing and rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 23, 2000.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: August 16, 2000

cc: Kenneth M. Carpenter
Kent G. Huntington

SMITH V DVA, 99-7133
(CVA – 95-638)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.